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SUMMARY RECORD OF THE 698th MEETING

Held at Headquarters, New York,
on Tuesday, 27 June 2000, at 10 a.m.

Chairman:

Mr. Jeffrey CHAN

(Singapore)

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The meeting was called to order at 10.10 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4)

1. The CHAIRMAN invited the Commission to consider the proposal submitted by the representative of Canada at the 697th meeting on the terms of reference for the Working Group on International Contract Practices, in accordance with which the Working Group was to examine articles 1-17 of the draft Convention and, where necessary, introduce any changes. A counter-proposal from the Singapore delegation held that the Working Group should restrict itself to making the draft Convention internally consistent. It should not introduce changes to articles that had already been settled.
2. Ms. SABO (Observer for Canada) said that there was little difference between her delegation's proposal and that of the Singapore delegation. Both required that the Working Group should make no policy changes.
3. Mr. MORÁN BOVIO (Spain) expressed a preference for the approach suggested by the Canadian delegation. The Working Group had proved its competence and ability to solve problems. The draft Convention had been completely restructured by the Commission, and any attempt to tie the Working Group's hands might limit its ability to fulfil its mandate. The Canadian proposal had the requisite degree of both strictness and flexibility. Any narrower terms of reference would imply mistrust of the Working Group.
4. Mr. WINSHIP (United States of America) said that his delegation saw little substantial difference between the two proposals, since the Commission would in any case review the Working Group's conclusions. He wished, however, to propose that if any time remained after the completion of its other work, the Working Group should consider a further point of substance, namely, the status of mobile equipment under the draft Convention. As stated in document A/CN.9/XXXIII/CRP.1/Add.9, paragraph 22 quater, the Committee had decided to defer a decision until the Draft Convention on International Interests in Mobile Equipment and its protocols on aircraft, space equipment and railway rolling stock ("the UNIDROIT draft Convention") was closer to completion. That was not the only consideration, however; it was also possible that the draft Convention on assignment of receivables might be intrinsically inappropriate to mobile equipment in view of the working practices of the industries involved. It was an open issue that needed to be settled. The question was whether it should be entrusted to the Working Group or should await the attention of the full Commission. His delegation's preference would be for the former option.
5. The CHAIRMAN said that, since the issue had not been addressed during the Commission's recent deliberations, it would be advisable not to extend the Working Group's terms of reference.
6. Mr. ONG (Singapore) said that he had understood the Canadian proposal to be close to that of his own delegation. It appeared, however, that the Canadian delegation would countenance the Working Group's making changes to the text in relation to issues that the Commission had already settled. The Working Group

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could naturally recommend changes, but its entitlement to introduce changes on its own initiative should be restricted to article 18 onwards. If the Working Group redrafted the whole text it would cast doubt on the value of the Commission's work over the past two weeks.

7. Mr. MARADIAGA (Honduras) said that the Commission should not hamstring the Working Group. Significant changes had been made to the draft Convention, so the Working Group would obviously have to review some articles whose content had been decided. It would, of course, have to explain to the Commission any changes that it might make.

8. Mr. RENGEL (Germany) said that a considerable number of issues remained open, even in articles 1-17, such as the question of mobile equipment and, if his understanding was correct, the question of location in the context of financial services. The Working Group should not only aim to make the text internally consistent but it should also be empowered to make recommendations.

9. Ms. GAVRILESCU (Romania) expressed her delegation's support for the view that policy decisions already reached by the Commission should not be reopened. There was, however, no reason why the Working Group should not discuss - and have included in its terms of reference - the issues mentioned by the representatives of the United States and Germany.

10. Mr. GHAZIZADEH (Islamic Republic of Iran) concurred with the representative of Spain in supporting the Canadian proposal as it stood. There was no need to impose narrow restrictions on the Working Group.

11. Mr. ATWOOD (Australia) said that, if the Canadian proposal was that the Working Group should be charged with reviewing articles 1-17 and changing the order and wording in the interests of making the text clearer, his delegation was in favour of it. As for the United States proposal, he saw no objection to the Working Group's considering the issue of mobile equipment, provided that it did so after completing the rest of its mandate.

12. The CHAIRMAN said that any fears that in reordering the language of the draft Convention the Working Group would change decisions reached by the Commission had surely been allayed. He wished it formally understood, however, that the Working Group should not change any policy agreed on by the Commission. He also saw merit in the suggestion by the representative of Australia that the issue of mobile equipment should be broached only after the completion of the Working Group's other work. On that understanding, he took it that the Commission wished to adopt the terms of reference submitted by the Canadian delegation.

13. It was so decided.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS
(A/CN.9/471 and Add.1-9)

14. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that the entire text of the draft legislative guide had had its first reading before the Commission and some chapters their second. Following the thirty-second session,

the Secretariat had, in accordance with the Commission's instructions, convened an expert group to revise the legislative recommendations in their entirety and to make the text consistent and concise. To that end, some chapters had been merged and repetitious material eliminated, while taking account of the Commission's decisions. It had been agreed at the previous session that the substance of the draft guide was broadly acceptable. It therefore remained for the Commission only to consider the draft legislative recommendations contained in document A/CN.9/471/Add.9. There was no need to consider the accompanying notes, which provided a commentary.

15. The CHAIRMAN invited the Commission to consider the draft legislative recommendations contained in document A/CN.9/471/Add.9 one by one, referring to the notes only when necessary.

16. Mr. WALLACE (United States of America) said that his delegation would refrain from commenting on the majority of the recommendations in the hope that the current exercise could be concluded rapidly and that the Commission would then decide to extend the project through the inclusion of model provisions or a model law on privately financed infrastructure projects.

17. Mr. SARIE-ELDIN (Egypt) said that he strongly supported the proposal for a model law.

18. Ms. NIKANJAM (Islamic Republic of Iran) said that a model law would be of great use to Governments such as her own.

19. Mr. LALLIOT (France) pointed out that in the foreword to the Guide, the user was advised to read the Legislative Recommendations together with the notes; thus, there was little need for further amendment of the former. However, he agreed with the representative of the United States of America that chapters 1 and 7 could be combined.

20. Mr. WIWEN-NILSSON (Observer for Sweden) said that while he was in favour of discussing the possible development of a model law, such discussion should not begin until the Commission had completed its work on the recommendations in order not to delay finalization of the Guide.

Chapeau (A/CN.9/471/Add.9)

21. Mr. REICHEL (Observer for the World Bank) suggested that the chapeau would be improved by the addition of a general admonition that the greater the number of restrictions under domestic law, the harder it would be to implement the projects covered by the Guide; the contracting authorities should be given as much flexibility as possible.

22. Mr. RENGGER (Germany) said that new issues should not be raised at such a late stage of the Commission's work.

23. Mr. DARCY (United Kingdom) said that the wording of the chapeau had been carefully chosen and should be left unchanged. It was important for States to realize that if they were serious in their desire to implement privately

financed infrastructure projects, the Guide must be followed quite closely; there was very little room for compromise.

24. The CHAIRMAN suggested that the Commission might consider adding a specific recommendation embodying the World Bank proposal rather than amending the chapeau.

25. Mr. WIWEN-NILSSON (Observer for Sweden) noted that the point raised by the observer for the World Bank had already been made elsewhere in the recommendations and the notes, which had been drafted with care in order to ensure maximum flexibility for the contracting authorities.

26. Mr. LALLIOT (France) said that in view of the Commission's time constraints, it would be best to leave the recommendations in their current form. The World Bank proposal was unnecessary and might even lead to confusion: it constituted a statement rather than a recommendation and, as the observer for Sweden had noted, the underlying principle was already present in the document as a whole. In any case, the contracting authorities must not be led to believe that they were free to do as they liked rather than following the Commission's recommendations.

27. The CHAIRMAN said that there seemed to be little support for the World Bank proposal.

Draft recommendation 1

28. Ms. SANDERSON (Observer for Canada) said that since the words "legislative and institutional framework" were mentioned in the recommendation, they should perhaps be included in the chapeau as well.

29. The CHAIRMAN suggested that the matter should be referred to the Secretariat.

30. Mr. SARIE-ELDIN (Egypt) suggested that "constitutional," should be inserted before "legislative".

31. The CHAIRMAN said that if there was no objection, he would take it that the Commission wished to approve that amendment.

32. It was so decided.

33. Ms. NIKANJAM (Islamic Republic of Iran) proposed that the recommendation should be amended to make it clear that all parties, including the host country, should eliminate undesirable restrictions to private sector participation in infrastructure development and operation.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) said that that point had been made elsewhere.

35. Ms. NIKANJAM (Islamic Republic of Iran) replied that it should also be made in recommendation 1 in order to give it the full authority of the Commission.

36. The CHAIRMAN said that there seemed to be little support for the Iranian proposal.

37. Mr. WIWEN-NILSSON (Observer for Sweden) said that since the Guide did not constitute a legal instrument open to interpretation, he saw little need for redrafting.

38. Draft recommendation 1, as orally amended, was adopted.

Draft recommendation 2

39. Mr. SARIE-ELDIN (Egypt) suggested that the words "to grant the concession and" should be inserted after "empowered".

40. Mr. ESTRELLA FARIA (International Trade Law Branch) said that reference to the granting of concessions had been deliberately avoided in the recommendations because not all national systems distinguished between concessions and project agreements. However, the expression "contracting authority" was defined in paragraph 17 of document A/CN.9/471/Add.1 and should be sufficient.

41. Mr. SARIE-ELDIN (Egypt) said that the use of that expression did not resolve the underlying problem. Some legal systems made a distinction between the contracting authorities and the granting authorities, and it was important to specify which of them was empowered to grant the necessary licences.

42. Mr. WALLACE (United States of America) said that although the United States of America was not a civil law jurisdiction, his delegation supported the Egyptian proposal.

43. The CHAIRMAN said that if there was no objection, he would take it that the Commission wished to approve the proposal made by the representative of Egypt.

44. It was so decided.

45. Draft recommendation 2, as orally amended, was adopted.

Draft recommendation 3

46. Mr. WALLACE (United States of America) proposed that the words "and ownership" should be added after one of the two instances of the word "operation".

47. Mr. DARCY (United Kingdom) proposed the addition of the words "and financing" before "of existing" and the deletion of the word "and" before "operation".

48. Mr. LALLIOT (France) said that he could not support the proposal made by the representative of the United States of America because some legal systems did not permit the granting of concessions for ownership. In reply to the representative of the United Kingdom, he said that the issue of financing was dealt with elsewhere and should not be raised in recommendation 3.

49. Mr. SARIE-ELDIN (Egypt) said that although his own country had a civil law system, he had no objection to the amendments proposed by the representatives of the United States of America and the United Kingdom. With respect to the first point raised by the representative of France, he noted that the words "may include" made it clear that inclusion would depend on whether private ownership of property was permitted under a given legal system.

50. Mr. ONG (Singapore) said that he agreed with the representative of France. The main purpose of the project was to promote the construction, expansion and operation of infrastructure; ownership was a subsidiary issue which, like occupation, lease and transfer, was dealt with in the notes.

51. Mr. WIWEN-NILSSON (Observer for Sweden) said that the purpose of the recommendation was to cover the construction or refurbishment of infrastructure. However, the question of ownership was raised in document A/CN.9/471/Add.2, paragraph 9, and the Commission might wish to discuss whether to consider the desirability of restrictions on the ownership of public property in connection with recommendation 1.

52. Mr. RENGIER (Germany) said that he agreed with the observer for Sweden; mention of ownership in recommendation 3 would cause serious problems.

53. Ms. FOLLIOT (France) said that in any case, the issue was covered adequately in chapter VII, paragraphs 7-9 (A/CN.9/471/Add.8).

54. Ms. GAVRILESCU (Romania) and Mr. MARADIAGA (Honduras) said that they associated themselves with the comment made by the representative of France.

55. The CHAIRMAN said that there appeared to be a consensus that recommendation 3 should remain unchanged.

56. Draft recommendation 3 was adopted.

Draft recommendation 4

57. Mr. MORENO RUFFINELLI (Paraguay) said that the recommendation should be made more flexible, since developing countries might need to amend their legislation periodically in order to establish new sectors.

58. Ms. NIKANJAM (Islamic Republic of Iran) suggested that the problem could be solved by replacing the word "should" with "may".

59. Mr. PINZÓN SÁNCHEZ (Colombia) said while he had no objection to that suggestion, it might be better to state that the law should identify the sectors or types of infrastructure in respect of which concessions could not be granted.

60. Mr. RENGIER (Germany) said that the Commission should be very careful about changing anything in that carefully worded recommendation. The word "should" was used in other recommendations, and had a stronger meaning than the word "may". He did not foresee any problems with priority questions or negative lists. The law should identify the relevant sectors, and that could be done in a positive or negative way.

61. Ms. NIKANJAM (Islamic Republic of Iran) noted that the word "may" was used in recommendation 3, admittedly in a slightly different context. However, she would accept the Secretariat's decision.

62. Mr. MORENO RUFFINELLI (Paraguay) said he had interpreted the recommendation rather differently from the Secretariat, understanding it as an unnecessary limitation of the sectors in which the privately financed infrastructure projects might take place.

63. Mr. LALLIOT (France) said he shared the views of the German delegation. The Commission had instructed the Secretariat to find wording for the recommendation to make it sound like an incentive. In response to the comment by the Iranian delegation, he noted that the word "may" was used in recommendation 3 in the context of a more general statement, rather than an address to those States which were interested in following the guide's recommendations.

64. The Colombian proposal to make it a negative formulation was worthy of consideration.

65. The CHAIRMAN noted that the issue had been discussed at a previous meeting, and it had been decided that the recommendation should not be formulated in a negative manner.

66. Mr. MARADIAGA (Honduras) said that the document was an extremely valuable instrument, containing very positive recommendations. His country, while following the work of the Commission, had already passed a law on concessions that was based on the draft guide.

67. He shared the concern of the representative of Paraguay that some countries might have requirements that were not considered in the draft. The recommendation should be phrased in such a way that countries would be free to incorporate sectors that were not already specifically mentioned. Members should recall that the Commission was comprised of representatives of both developed and developing countries.

68. Mr. ONG (Singapore) noted that the concerns of the representatives of Paraguay and Honduras were probably addressed in paragraph 18 of document A/CN.9/471/Add.2, which indicated that recommendation 4 was not intended only as a positive delimitation of types of projects that would be permitted.

69. The CHAIRMAN noted that the recommendations were not intended to hamstring Governments but were offered for their consideration when dealing with publicly financed infrastructure projects in their countries.

The meeting was suspended at 11.45 a.m. and resumed at 12.10 p.m.

70. Mr. DARCY (United Kingdom) associated himself with the comments made earlier by the German delegation. The word "should" was very important because it made clear to potential private sector investors and bidders which areas they could legitimately take an interest in.

71. The CHAIRMAN said that, in the absence of a consensus, and in the light of the fact that some of the concerns expressed were addressed in the notes, he assumed that recommendation 4 would be accepted in its present form.

72. Draft recommendation 4 was adopted.

Draft recommendations 5-12

73. Draft recommendations 5-12 were adopted.

Draft recommendations 13 and 14

74. Mr. WALLACE (United States of America) suggested adding, after the word "support" in the second line, the words ", including public loans and guarantees, equity participations, subsidies and sovereign guarantees and assurances,". The wording was taken from the notes, but would make the recommendation clearer to the legislator. Alternatively, the new text could be added in the third line after the words "types of support".

75. Mr. SARIE-ELDIN (Egypt) wondered whether recommendation 13 was feasible at all, as it did not seem possible in practice to specify by law one authority to provide all the types of guarantees referred to.

76. Mr. WALLACE (United States of America) noted that the word "authorities" was used in the plural. It was essential to specify from which ministries or agencies guarantees could be obtained, as problems had arisen in the past when it had not been clear which body was responsible. There was a clear connection with recommendation 2.

77. The CHAIRMAN asked the Secretariat whether the issue had been discussed at the previous session of the Commission.

78. Mr. ESTRELLA FARIA (International Trade Law Branch) noted that the recommendation did indeed reflect a policy directive of the Commission.

79. The term "public authorities" had been used in the plural to indicate that more than one might be specified, but the decision as to which authorities could provide which type of assurance was an internal matter for the host country. It would not necessarily all have to be covered by the same piece of legislation, which was why the generic phrase "the law" had been used, without specifying which law.

80. Ms. FOLLIOT (France) and Mr. DARCY (United Kingdom) supported the United States proposal.

81. Ms. Li Ling (China) and Mr. MARADIAGA (Honduras) preferred recommendation 13 to remain unchanged.

82. The CHAIRMAN, in the absence of a consensus, assumed that the concerns raised would be met by the text of the notes, and that the present wording of recommendation 13 would be retained.

83. It was so decided.

84. Draft recommendations 13 and 14 were adopted.

Draft recommendation 15

85. Mr. ESTRELLA FARIA (International Trade Law Branch) noted that the Secretariat would be grateful if members of the Commission could point out any difficulties of translation in the Arabic, Chinese and Russian versions of the document. The Secretariat could deal with the other languages involved.

86. In the French text of recommendation 15, the words used to translate the English expression "competitive procedures" seemed literally to mean "open procedure".

87. The term "competitive procedures" had been chosen after extensive discussions at previous sessions. It was understood to mean that prospective concessionaires would be invited to present offers and to compete with regard to the terms of their offers for the contract being offered. It was not a technical expression, as they did not want a term that referred to any specific type of procedure already known under domestic law. There had been an extensive debate on that issue, and on how the general provisions related to the exceptions described later in the chapter. There was no reference to bidding or tendering or other procedures used in other types of procurement contracts, as the chapter should not look like a general procurement code. The prospective concessionaires were to compete for the award of the project.

88. He asked the French-speaking members of the Commission to clarify whether that phrase adequately expressed the meaning of the English text.

89. Ms. FOLLIOT (France) said that procédure ouverte was the French term used in the European guidelines on the awarding of contracts. Therefore, if official terminology relating to public contracts was to be avoided, procédure ouverte could not be used. Her delegation proposed that the term should be replaced by procédure de mise en compétition, which did not have any special technical meaning and reflected the Secretariat's point of view.

90. Mr. MAZZINI (Observer for Morocco) said that his delegation supported the French proposal. The Arabic translation of "competitive procedure" was correct.

91. Mr. SARIE-ELDIN (Egypt) said that chapter III contained no reference, either in the recommendations or the notes, as to whether the Commission wished to encourage legislators to have a specific law on the selection of the concessionaire, particularly for privately financed infrastructure projects. He wondered whether the Commission had considered that policy matter.

92. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the Commission had not made any strict recommendation as to whether such issues

should be dealt with in one specific law or in several. In general, the approach that had been taken was that any piece of legislation that dealt specifically with privately financed infrastructure projects could either incorporate the entire selection process or simply contain a cross reference to the most appropriate procurement method obtainable in the host country.

93. Ms. GAVRILESCU (Romania), and Ms. ALLOUCH (Observer for Canada), supported the French proposal.

94. The CHAIRMAN said that the term proposed by the representative of France would replace the term procédure ouverte in the French text of recommendation 14.

95. Draft recommendation 15, as orally amended, was adopted.

Draft recommendations 16-20

96. Draft recommendations 16, 17 and 19 were adopted.

97. Mr. WALLACE (United States of America) said that, since recommendations 18 and 20 were related, the words "should invite" in recommendation 18 should be amended to read "should request" in order to be in line with the words "final request" in the first line of recommendation 20.

98. The CHAIRMAN said that the Commission accepted the editorial change proposed by the representative of the United States of America.

99. Draft recommendations 18 and 20, as orally amended, were adopted.

Draft recommendations 21 and 22

100. Mr. RENGIER (Germany) said that, in an earlier document, recommendation 21 had appeared as recommendation 7, which had contained subparagraphs (a) and (b). Subparagraph (b) dealt with the importance of the obligation to keep minutes of meetings of the bidders that were convened by the contracting authority. He wished to know why recommendation 21 did not reflect the content of recommendation 7, which he believed had been accepted by the Commission.

101. Mr. ESTRELLA FARIA (International Trade Law Branch) said that, in reviewing the recommendations with the assistance of outside experts, the Secretariat had borne in mind one of the comments that had been made by the Commission in its consideration of chapter III. It had been proposed that, since recommendation 38 dealt with the subject of record keeping, such record-keeping obligations would apply throughout the procurement process. Paragraph 125 (f) of document A/CN.9/471/Add.4 referred to "a summary of any requests for clarification of the pre-selection documents or the request for proposals, the responses thereto, as well as a summary of any modifications of those documents". While it might not be apparent that that included keeping proper records and minutes of meetings, the Secretariat believed that, for economy of language, paragraph 125 (f) was the most appropriate place to make the reference, bearing in mind that recommendation 38 contained a general reference to record keeping.

102. Mr. MORÁN BOVIO (Spain) said that paragraphs 71 and 72 of document A/CN.9/471/Add.4, particularly the last sentence of paragraph 72, provided an answer to the question raised by the representative of Germany.

103. Draft recommendations 21 and 22 were adopted.

Draft recommendation 23

104. Mr. WALLACE (United States of America) said that, since the tolls, fees and other charges referred to in recommendation 23 (a) normally accrued to the concessionaire, he wished to know whether such tolls, fees and charges should be low or high. Since subparagraphs (b) and (d) were related, he wondered whether or not they should be combined. Drawing attention to paragraph 77 of chapter III in document A/CN.9/471/Add.4, which stated that the contracting authority should consider carefully the relative importance of the proposed unit price for the expected output as an evaluation criterion, he proposed the addition of a new subparagraph (g), which would refer to the "unit price approach" as described in paragraph 77.

105. Mr. ESTRELLA FARIA (International Trade Law Branch) said that an extensive discussion had been held about the public service nature of most privately financed infrastructure projects and the interest of the contracting authority in ensuring a certain level of quality of service. One of the criteria determining the acceptability of the proposal that the contracting authority might wish to take into account was the amount that it would have to pay for that service. Such payment did not involve income for the contracting authority but was an expense for the general public. There was therefore a public interest in including that as an evaluation criterion.

106. In an extensive debate concerning subparagraphs (b) and (d), the representative of France had pointed out that, if the contracting authority was making a payment for a service that was being provided to it, the payment did not represent a form of government support but was simply the fulfilment of a contractual obligation by the concessionaire to the benefit of the contracting authority. For reasons of clarity, it was deemed that that subject should not be dealt with in the chapter concerning government support. A distinction had therefore been made in recommendation 23 between subparagraphs (b) and (d). Subparagraph (d) dealt with other forms of support, such as subsidies and guarantees, that might not be provided by the contracting authority itself but by someone else.

107. Instead of adding a new subparagraph (g), perhaps additional language could be added to subparagraph (a).

108. Mr. WALLACE (United States of America) said that his delegation accepted the Secretariat's comments and suggestion.

109. Mr. RENGEL (Germany) said that the Secretariat should provide further explanation about subparagraph (f), which seemed to contain a new text. He wished to know whether the words "the proposed contractual terms" referred to the contractual terms for the financing or the contractual terms for the concession.

110. Mr. ESTRELLA FARIA (International Trade Law Branch) said that there had been a debate on the subject, in which the representative of the United Kingdom and the observer for Sweden had taken part. Basically, the issue concerned the degree of responsiveness of the proposal to the contractual terms. The distinction between what was financial and what was not had not been made entirely clear, since many of the terms of the contract appeared to deal only with legal issues, such as compensation due upon termination. Perhaps the delegations that had participated in the previous year's discussion would be in a better position to enlighten the Commission.

The meeting rose at 1 p.m.